

LAWYERS TITLE INSURANCE CORP.

IBLA 85-402

Decided June 6, 1986

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dismissing protest to the filing of a plat of a dependent resurvey and omitted land survey of certain lands in Wisconsin. ES-30592.

Vacated and referred for hearing.

1. Board of Land Appeals -- Surveys of Public Lands: Generally --
Surveys of Public Lands: Dependent Resurveys -- Surveys of Public
Lands: Omitted Lands

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

2. Surveys of Public Lands: Omitted Lands

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shore line rather than the meander line is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

3. Rules of Practice: Appeals: Hearings -- Surveys of Public Lands:
Omitted Lands

Where, on appeal, the question is presented whether certain lands were omitted from the original survey

because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

APPEARANCES: John R. Decker, Esq., Milwaukee, Wisconsin, for appellant;
Mary Katherine Ishee, Esq., Office of the Solicitor, Alexandria, Virginia, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Lawyers Title Insurance Corporation (Lawyers Title) has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated January 4, 1985, dismissing its protest to the filing of a plat of the dependent resurvey of the boundaries of sec. 21, T. 40 N., R. 5 E., fourth principal meridian, Wisconsin, and omitted lands survey. The plat of survey identified, as lots 5, 6, and 7, lands omitted from the original survey of sec. 21, filed January 17, 1865. Those lots contain 45.74, 33.91, and 19.77 acres, respectively, and lie adjacent to lots 1, 2, 3, and 4 returned in the original survey, containing 21.50, 43.80, 24, and 56 acres, respectively. Lawyers Title takes issue with BLM's characterization of lots 5, 6, and 7 of sec. 21 as erroneously omitted lands. 1/

The factual and procedural background leading to this appeal is important to our disposition of this case and will be set forth in detail. The lands at issue lie along the shore of Crawling Stone Lake (a.k.a. Big Crawling Stone Lake), near Lac du Flambeau, Wisconsin. In November 1950 BLM received two letters concerning alleged omitted lands lying between the record meander line fronting lots 2 and 3, sec. 21, and the shore of Crawling Stone Lake (BLM's Answer, Attachments 3 and 5). In separate responses to these letters, BLM in December 1950 stated that no definite opinion could be given as to the status of the lands fronting those lots in the absence of an on-ground examination. BLM further explained that since any unsurveyed lands in the township would be under the administrative jurisdiction of the Bureau of Indian Affairs, "any action as to the survey of these lands would be initiated upon the application of that Bureau." 2/ BLM further suggested that the matter be brought to the attention of the local Bureau of Indian Affairs office in Ashland, Wisconsin (BLM's Answer, Attachments 4 and 6).

Nothing further appears in the record in this case until in 1972 the Bureau of Indian Affairs applied to BLM for a survey, inter alia, of the ____

1/ Lawyers Title states that it is adversely affected because it has issued policies of title insurance to persons claiming title to lands lying within lots 4, 5, and 6, and that certain of those policy holders made claims against Lawyers Title based upon BLM's notice of intention to file a plat of survey.

2/ Sec. 21, T. 40 N., R. 5 E., is included within the Lac du Flambeau Indian Reservation.

lands in question (BLM's Answer, Attachment 7). In response thereto, BLM issued special survey instructions dated April 17, 1973. The instructions called for preliminary examination and conditional survey of "[a]lleged omitted lands in section 21" (BLM's Answer, Attachment 8 at 1). The instructions stated, "[T]he * * * quadrangle map indicates that there is considerably more upland located in sec. 21, T.40 N., R.5 E., than shown on the original plat of survey." Id. at 2. Further, the instructions directed:

To determine whether lands have been erroneously omitted from the original survey along Crawling Stone Lake, the field work will be extended to reestablish the original meander line. An examination will be made of the excluded area to determine if it existed as upland-in-place on May 29, 1848, when Wisconsin gained statehood, and at all subsequent dates, and to ascertain the extent of the omission.

The examination and determination of the area will include the study of physical evidence on the ground and any available records of earlier surveys or maps.

Id. at 3. Interested parties, including landowners of record, were given notice of the survey by letters dated April 26, 1973 (BLM's Answer, Attachments 9 and 10).

The field notes for the survey show that field work commenced on April 17, 1973, and was completed on May 23, 1973. On May 18, 1975, the Director, Eastern States Office, transmitted the final returns of a number of surveys, including that in issue herein to the Chief, Director of Cadastral Survey. In a memorandum to the Director, Eastern States Office, dated September 23, 1975, the Chief, Division of Cadastral Survey, rejected the survey (BLM's Answer, Attachment 12). He stated the question presented was whether or not the original survey was so grossly erroneous as to result in constructive fraud on the Government. He cited United States v. Lane, 260 U.S. 662 (1923), as establishing the guiding principles. He found:

An examination of the original survey plat and the U.S.G.S. Quadrangle "Lac Du Flambeau, 1938" reveals a marked similarity in the shape and size of the lakes within the township. This would seem to indicate that James McBride, Deputy Surveyor and B. F. Woods completed the surveys with diligence and due care.

He concluded there was not "sufficient evidence to sustain a court test for gross error which would be constructive fraud on the Government." He further stated "it is our opinion that the omitted lands area should be at least equal in acreage to the upland lots."

On September 29, 1975, the Chief, Division of Cadastral Survey for the Eastern States Office, placed a memorandum in the file vigorously defending the survey stating:

It is the opinion of this office that, that portion of the meander line of Crawling Stone Lake in section 21 is fictitious and that the omitted land survey executed by this office is well justified. Over 100 acres of high value lake shore property has been omitted.

(BLM's Answer, Attachment 13). In light of that memorandum the Chief, Division of Cadastral Survey, gave "serious reconsideration" to the case and again concluded in a October 14, 1975, memorandum to the Director, Eastern States Office, that there was "not sufficient evidence to sustain a court test," and he again rejected the survey (BLM's Answer, Attachment 14).

The record shows that on October 23, 1979, the Director, Eastern States Office, transmitted the final returns of the survey to the Director, BLM (BLM's Answer, Attachment 15). There is no indication whether the background memoranda were also transmitted. On December 5, 1979, the Chief, Cadastral Survey Examination and Approval Staff, accepted the survey (BLM's Answer, Attachment 15). 3/ Thus, the Department concluded gross error had been made in the original survey, and the lands adjacent to lots 1, 2, 3, and 4 in sec. 21 had been omitted.

On January 10, 1980, the plat of survey was returned to the Director, Eastern States Office, for filing. On September 1, 1982, BLM published notice in the Federal Register that the plat of dependent resurvey and survey of the omitted lands would be officially filed in the Eastern States Office, BLM, on November 30, 1982. The notice described the land as follows:

Fourth Principal Meridian, Wisconsin
T. 40 N., R. 5 E.
Sec. 21, lot 5 (45.74 acres); lot 6 (33.91 acres); lot 7
(19.77 acres)

* * * * *

3. The areas aggregate 99.42 acres. The land is nearly level to gently rolling, the elevation ranging from about 1,590 to 1,600 feet, it contains both upland and lowland areas. The soil in the upland area is sand and gravelly clay loam. This area is forested with red and sugar maple, paper birch, balsam fir, aspen, oak, and scattered clusters of white and Norway pine, and hemlock; in the understory, raspberry and blackberry briars, young timber, hazelnut brush, and native grasses are found.

3/ BLM represents in its answer at page 4:

"Since the time of the memorandum of the Chief, Division of Cadastral Survey of October 14, 1975, the policy issues involved in the Crawling Stone Lake survey, Sec. 21 had been reexamined. Based on the unique factors involved in the area, the Department approved the final returns on December 3, 1979."

BLM did not elaborate on what those "unique factors" were.

In the lowland areas, there are peat and poorly drained muskeg soils, composed entirely of organic matter upon a clay-gravel base. In the understory of the lowland areas, marsh grasses, shrubs, and sphagnum moss are found. There are many decayed stumps located on the omitted upland areas which indicated that they were once covered with a fine stand of old growth Norway and white pine.

Lot Nos. 5 and 6 were found to be over 50 percent upland in character within purview of the Swamp Lands Act of September 28, 1850 (9 Stat. 519). They are, therefore, held to be public land.

Lot No. 7 has been determined to be more than 50 percent swamp in character within the purview of the Swamp Lands Act of September 28, 1850. Title to this land inured to the State of Wisconsin as of that date, therefore, it is only open to selection by the State under that Act.

On November 29, 1982, Lawyers Title filed a request with BLM that it withhold filing the plat because of conflicting claims to the land. By memorandum dated December 10, 1982, the Chief Cadastral Surveyor, Eastern States Office, informed the Chief, Branch of Lands and Title Adjudication, that the official filing should be held in abeyance pending review of the "protest" filed by Lawyers Title. On January 17, 1983, in a Federal Register notice, the Director, Eastern States Office, stayed the filing of the plat of survey, stating:

The official filing of the plat is hereby stayed pending consideration of all protests and final determination of all objections to the survey. The plat will not be officially filed until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals.

48 FR 2071 (Jan. 17, 1983).

By letter dated January 25, 1983, BLM responded to Lawyers Title's letter explaining the reasons for the resurvey and omitted lands survey and the basis for its conclusion that the land was omitted land. BLM stated that if, upon review, Lawyers Title determined the resurvey and survey of omitted lands "was executed in error and without authority, please inform this office, so that the proper steps may be taken." ^{4/} BLM provided no time limit for filing a response.

^{4/} The record contains a number of letters or evidence thereof from affected landowners or their representatives inquiring about the effect of the resurvey and in some cases objecting to the resurvey. See letter dated Aug. 30, 1982, from Mrs. Darold Wegner; letter dated Nov. 24, 1982, from Chicago Title Insurance Company; letter dated Jan. 20, 1983, from Lawrence and Beatrice Lee; letter dated Jan. 14, 1983, from J. F. Batson; letter dated Jan. 26, 1983, from Carolyn A. Hegge, Esq.; letter dated Aug. 4, 1983, from W. Ross Yeschek. In most cases BLM provided a general response, sometimes including a copy of its Jan. 25, 1983, letter to Lawyers Title.

On March 23, 1983, BLM sent a follow-up letter to Lawyers Title stating:

Enclosed for your information is a copy of our reply to you on January 25, 1983, along with copies of the enclosures and certified receipt. As of this date, our office has not heard from your organization concerning this matter.

If you have any questions, please contact this office.

Again, BLM did not provide any time for response.

By letter dated July 6, 1983, Lawyers Title sought information concerning the status of the resurvey, stating that it had received no disposition of its objections. In a letter dated July 29, 1983, BLM informed Lawyers Title that since it had not heard anything in response to its January 25, 1983, letter the survey was officially filed in the Eastern States Office on April 25, 1983. On August 26, 1983, Lawyers Title filed an "appeal" of the filing of the plat claiming that BLM's July 29, 1983, letter was its first notice of the filing and that BLM's action was contrary to the Federal Register stay notice. BLM treated the appeal as a "protest," and on January 4, 1985, BLM issued a decision dismissing the protest. Lawyers Title filed a timely appeal of that decision. BLM and Lawyers Title each filed substantial documentation in support of their respective positions, briefing being completed on November 20, 1985. Lawyers Title requests an evidentiary hearing. BLM opposes that request arguing that the record presented to the Board is adequate to permit the Board to rule.

On appeal appellant claims the Department is without authority to resurvey to the prejudice of the present landowners, citing United States v. Reimann, 504 F.2d 135 (10th Cir. 1974). It claims that various landowners have erected improvements on the property worth in excess of \$ 400,000, and that such improvements were made on the basis of title traceable to Government patents. Appellant also charges BLM failed to provide adequate notice and opportunity to comment to affected owners.

Appellant argues the area claimed to have been "omitted" is of such a relatively small size (less than 100 acres) as to demonstrate the reasonable accuracy of the original survey. Appellant asserts the original survey met the proper standard of accuracy given the time, location, and condition of the land. BLM has failed to show the original survey was made with the intent to defraud the Government, appellant contends. The dependent resurvey, appellant argues, was not performed with reasonable accuracy and the field notes and BLM's assertions based on them mischaracterize the nature, elevation, and quality of the land in question. Appellant asserts the case of United States v. Zager, 338 F. Supp. 984 (E.D. Wisc. 1972), should be controlling.

BLM in its answer states that the dependent resurvey and survey of the omitted lands adequately protect the bona fide rights of landowners in the area. The case cited by appellant, United States v. Reimann, *supra*, BLM

charges, is inapposite because it refers to resurveys which retrace and/or reestablish boundaries in accordance with 43 U.S.C. § 772 (1982). BLM points out that "omitted" lands are lands that have never been surveyed and that the lands located between the original meander line and the actual shoreline were surveyed for the first time in 1973. Such a survey, BLM asserts, is not a resurvey within the meaning of Reimann.

BLM sets forth the chronology of events in this case and contends notice was provided to landowners and other potentially interested parties at all appropriate points in the filing process. Appellant's claim of lack of notice, BLM asserts, is unfounded. BLM argues the survey of December 5, 1979, was proper because the meander line shown on the survey of January 17, 1865, was fictitious and constituted constructive fraud against the Government. Appellant's claim that intentional fraud must be established, BLM contends, is erroneous. Finally, BLM asserts that United States v. Zager, supra, relied upon by appellant, is not controlling because it is distinguishable on its facts.

[1] Before considering the substantive issues presented by this appeal, we will first examine the procedural aspects of this case presented by appellant's claim of inadequate notice and opportunity to comment.

The record shows that in 1973, notice of the actual survey was provided to certain landowners of record (BLM's Answer, Attachment 9). In addition, notice of the intent to file the plat of survey was published in the Federal Register in September 1982. However, in response to objections filed by Lawyers Title, BLM stayed the filing of the plat by notice published in the Federal Register on January 7, 1983. As previously set forth, that notice stated BLM would not file the plat "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals." 48 FR 2071 (Jan. 17, 1983). BLM sent a letter to Lawyers Title in January 1983 addressing its concerns. When BLM received no response, it sent another letter on March 23, 1983, enclosing a copy of the first letter and stating, "If you have any questions, please contact this office." BLM did not establish in either letter any time deadline for responding nor did it indicate what the consequences would be of failing to respond. Without any further notice to Lawyers Title and in direct contradiction to the State Director's express statement in the Federal Register notice, on April 25, 1983, BLM officially filed the plat of survey.

BLM's only explanation for this action is set forth in its answer at page 12 where it states:

After the passage of 30 days [from the March 23, 1985, letter to Lawyers Title] without response [from Lawyers Title], the Bureau officially filed the plat of survey on April 25, 1983. During this time, the Bureau also responded to all inquiries submitted by affected landowners and other interested parties.

BLM does not state why 30 days was considered to be the response time. Lawyers Title was not informed that it had 30 days to respond. Nor does BLM

explain why it filed the plat before final resolution of Lawyers Title's complaint.

The proper procedure for BLM to have followed would have been for it to consider the objections to the proposed filing of the plat to be protests to action proposed to be taken under 43 CFR 4.450-2. Those protests should have been adjudicated by decision with the right of appeal granted to the protestants. Thus, in Lawyers Title's case if BLM considered its March 23, 1983, letter to have been a resolution of Lawyers Title's protest, it should have so stated and granted Lawyers Title 30 days from receipt thereof in which to file an appeal. It did not; instead it filed the plat. Despite the interest of Lawyers Title in the survey, BLM did not even notify it of the official filing. The statement in BLM's answer that "[d]uring this time" BLM responded to all inquiries is not supported by the record if "[d]uring this time" is considered to be the time between its March 23, 1983, letter to Lawyers Title and the filing of the plat. While the record contains copies of some correspondence with affected landowners, it shows a consistent lack of candor on the part of BLM regarding the possible effect of the omitted lands survey.

The record clearly establishes BLM acted improperly and in derogation of its stay notice in officially filing the plat of survey. BLM's action substantially delayed final adjudication of Lawyers Title's protest. Lawyers Title should have been allowed to appeal to this Board in 1983, prior to the official filing of the survey plat. Instead, when Lawyers Title finally learned of the filing, it filed a "notice of appeal" with BLM on August 26, 1983, within 30 days of its notice of the filing. Rather than forwarding that notice of appeal and the case file to the Board, however, BLM incorrectly decided to consider it a "protest." Not until January 4, 1985, did it resolve that "protest" by dismissing it.

Lawyers Title is finally before the Board. However, it is in the position of challenging the filing of the plat, rather than the proposal to file the plat. The purpose of notice of proposed filing is to resolve objections to the survey prior to official filing. BLM's action of filing the plat in this case was premature. Because the rights of landowners may be affected by the date of filing of the plat of survey, we find BLM's improper filing of the survey must be vacated. 5/

Vacation of the filing of the plat does not resolve Lawyers Title's substantive objections to the survey, however. Thus, we will examine the question whether the lands in question were, in fact, erroneously omitted from the original survey.

The Manual of Instructions for the Survey of the Public Lands of the United States (Manual) (1973) states at page 7-77 that the term "erroneously

5/ We note that under the regulations in 43 CFR Subpart 2545 relating to the obtaining of title to erroneously meandered lands in Wisconsin, applicants must file their claims within a time certain of the date of the official filing of the plat of survey. 43 CFR 2545.2(a). See Finley F. Martin, 86 IBLA 254 (1985).

omitted lands" applies "to lands, not shown on the plat of the original survey, which were excluded from the survey by some gross discrepancy in the location of a meander line. The unsurveyed land typically lies between the actual bank of a lake, stream, or tidewater and the record meander line." In this case the subsequent survey established that slightly less than 100 acres of land lies between the original meander line and the actual shoreline of Crawling Stone Lake.

[2] The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shoreline, rather than the meander line, is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. Hardin v. Jordan, 140 U.S. 371, 380 (1891); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 286-87 (1868); Greene v. United States, 274 F. 145, 149 (5th Cir. 1921). An exception to this rule arises where lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line. Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561 (1923); Lee Wilson & Co. v. United States, 245 U.S. 24 (1917); Producers Oil Co. v. Hanzen, 238 U.S. 325 (1915); Mitchell v. Smale, 140 U.S. 406 (1891); United States v. Otley, 127 F.2d 988 (9th Cir. 1942). ^{6/}

The analysis of whether to apply the general rule or the exception to a particular case involves the application of various judicially evolved factors applied to the facts of the case. See United States v. Lane, *supra*; Jeems Bayou Fishing & Hunting Club v. United States, *supra*; Lee Wilson & Co. v. United States, *supra*; Producers Oil Co. v. Hanzen, *supra*; Security Land & Exploration Co. v. Burns, 193 U.S. 167 (1904); Mitchell v. Smale, *supra*; United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); United States v. Otley, *supra*; United States v. 295.90 Acres of Land, 368 F. Supp. 1301 (M.D. Fla. 1974), *aff'd*, 510 F.2d 1404 (5th Cir. 1975); United States v. Zager, *supra*. The first factor is the size of the parcel involved. In United States v. 295.90 Acres of Land, *supra* at 1308, the court stated that consideration of size has three relative aspects:

- (a) [T]he size or area of the parcel as shown by the original survey, (b) the relative size or area of the 'new' area disclosed by the more recent survey; and (c) the size or magnitude of the

^{6/} For a comprehensive discussion of omitted lands issues, including the gross error or fraud exception see Morgenthaler, Surveys of Riparian Real Property: Omitted Lands Make Rights Precarious, in 30 Rocky Mt. Min. L. Inst. 19-1 (1984). As explained therein, the rationale for the exception is that where a surveyor commits gross error or fraud such that a sizable amount of upland goes unsurveyed, the Government should not lose its title to that land to a riparian landowner. *Id.* at 19-31. While the equities of the exception are most apparent vis-a-vis omitted islands or spits and tongues of land, the exception cuts off all the riparian rights of the patentee where omitted shoreline is involved. *Id.* at 19-32.

original surveyor's error measured by the amount of unsurveyed land in the surrounding vicinity as a whole.

The court concluded, however, that the most important test is the size of the tract shown on the original survey, as related to the size of the area added by the more recent survey. It discounted the scope of the surveyor's error within the surrounding area as being of only secondary importance, at best. Id. at 1308. In United States v. Zager, supra, the court compared the acreage and determined that in terms of percentage the omitted lands represented 35.13 percent of the total acreage. It found that percentage to be insufficient to support the Government's claim that the land had been erroneously omitted when considered with other facts in that case. 338 F. Supp. at 990.

The second factor is intent of the surveyor. In Producers Oil Co. v. Hanzen, supra, the Supreme Court examined the circumstances and found the surveyor had not intended the meander lines to delineate a water body. Thus, no riparian rights were ever created. In Jeems Bayou Fishing & Hunting Club v. United States, supra, a party claimed title to a "peninsula" of land extending into Jeems Bayou. However, the "peninsula" was, in fact, surrounded in all directions, except one, by more than 500 acres of firm upland. The Court found under the facts no meander line was intended, and although it declined to speculate on why the surveyor had returned the survey as he did, it concluded "[t]he circumstances, as well as the extent and character of the lands, necessitate the conclusion that the omission was of deliberate purpose or the result of such gross and palpable error as to constitute in effect fraud on the Government." 260 U.S. at 564. The Court stated an exception to the general rule applied where no body of water existed or exists at or near the place indicated on the plat or where there never was an attempt to survey the land in controversy. In another case the Wisconsin Supreme Court found that the surveyor had conducted a "paper" survey, stating that the magnitude of the error was so great as to indicate the meander line was never actually run. Brothertown Realty Corp. v. Reedal, 227 N.W. 390 (Wis. 1929). Thus, courts have examined the intent of the surveyor with the purpose of determining whether riparian rights are, in fact, involved.

A third factor is the nature and value of land at the time of survey. In Lane v. United States, supra, the Supreme Court, applying the general rule, stated at pages 666-67:

The evidence justifies the conclusion that in 1839, and especially in time of high water reaching back into the ravines, the establishment of a line precisely coincident with the water's edge would have been a matter of expense and difficulty wholly disproportionate to the then value of the omitted acreage. * * * Considering the circumstances in respect to the character and value of the lands, the wildness and remoteness of the region, and the difficulties surrounding the work of the surveyors, the failure to run the lines with more particularity was not unreasonable.

In reliance on Lane, the district court in United States v. 295.90 Acres of Land, 368 F. Supp. at 1309, made a similar finding stating that the land in question "was truly wild and remote." In another district court case in Wisconsin, and the one appellant points to as controlling, the court applied the general rule finding that the land in question therein was wild, remote, and in large part "practically worthless" at the time of survey. United States v. Zager, 338 F. Supp. at 990. These courts, thus, attributed the error in the original survey to the particular circumstances existing at the time of the survey. 7/

[3] The courts have weighed and balanced these factors in light of the facts of each omitted lands case in arriving at their various determinations to apply the general rule or the exception. The importance of the unique facts of each case cannot be overlooked in such cases. While both BLM and appellant have presented much documentation in support of their respective positions, we believe the opportunity to present evidence before an Administrative Law Judge with any supporting testimony of witnesses and the opportunity to cross-examine such witnesses would help to elicit those particular facts necessary to proper resolution of this case.

The facts concerning the character and value of the land at the time of survey have not been fully developed. There is no evidence whether the shoreline of the lake has changed substantially since the time of the original survey. Natural ecological succession of swamp or bog lands over a period of more than 100 years might account for some increase in acreage. BLM's characterization of the omitted lands as "99.42 acres of timbered upland" (BLM Answer at 31) appears to be belied by the field notes and report of corners of the 1979 survey which describe the character of the land at the various original meander points. 8/ Appellant's Response to Motion, Attachments A-2 and A-3; see also BLM's Answer to Appellant's Response to Motion, Attachments 4 and 5.

In addition, we note BLM relies on the statement of the Chief, Division of Cadastral Survey for the Eastern States Office, that "the record meander line in question falls entirely on the upland totally out of sight of the lake" (BLM Answer at 21, attachment 13 at 2 (emphasis added)). That statement clearly is not supported by the record. Angle points 12 and 13 of the original meander line are actually in the lake. See note 8, supra.

7/ The court in United States v. 295.90 Acres of Land, 368 F. Supp. at 1310, limits application of the exception to gross error or fraud to the degree of finding that no body of water exists or existed at or near the place indicated. The court stated, "The exception to the rule, after all, is just that -- an exception. Strong policy considerations are aligned against its application except in the most egregious circumstances. Century old surveys are bound to be inaccurate in some respects * * *." Id. at 1310-11.

8/ These included angle point 1: stream; angle point 2: large open bog; angle point 6: swampy area; angle point 9: north side of alder swamp; angle point 11: low boggy area; angle points 12 and 13: in the lake. In addition, the surveyors concluded that more than 50 percent of lot 7 was swamp in character.

In order to allow the parties the fullest opportunity to develop the facts which will control disposition of this case, we will refer the case to the Hearings Division for assignment of an Administrative Law Judge. Following the hearing, the Administrative Law Judge shall issue an initial decision determining whether or not the land included in lots 5, 6, and 7 of sec. 21 was omitted from the 1865 survey on the basis of gross error or fraud. ^{9/} The Administrative Law Judge's decision shall be final for the Department in the absence of an appeal to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is referred to the Hearings Division.

Bruce R. Harris
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Wm. Philip Horton

Chief Administrative Judge

^{9/} The Manual contains the following statement regarding the evidence necessary to establish that lands have been erroneously omitted:

"7-80. If land is to be regarded as erroneously omitted from survey, it must first be shown affirmatively that the area was land in place at the date of the original subdivision of the township. Then, if the land is similar to the surveyed lands, the usual inference that the official survey was correct may be set aside, and the conclusion may be substituted that the land should have been covered by that survey. However, a convincing showing is needed that the representations of the original plat and field notes are grossly in error." (Emphasis in original.)

While courts have expressed the standard of proof required in omitted lands cases in various fashions, Hardin v. Jordan, 140 U.S. at 400 ("extraordinary proof"), United States v. Otley, 127 F.2d at 995 ("evidence which commands respect, and * * * produces conviction"), Snake River Ranch v. United States, 395 F. Supp. 886, 900 (D. Wyo. 1975), aff'd, 542 F.2d 555 (10th Cir. 1976) ("clear and convincing"), and United States v. Zager, 338 F. Supp. at 990 ("preponderance of evidence"), it is clear the Government bears the ultimate burden of persuasion in such cases. We note the Zager court stated the parties had disagreed over the proper burden of proof, Zager arguing clear and convincing evidence was necessary and the Government asserting only a preponderance of evidence was required. The court concluded it did not have to decide that issue because the Government "failed to meet the lesser burden." United States v. Zager, 338 F. Supp. at 990 n.18.

